

February 2017

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Recommended Citation

Oriana Mazza (2009) "The Right to Wear Headscarves and Other Religious Symbols in French, Turkish, and American Schools: How the Government Draws a Veil on Free Expression of Faith," *Journal of Catholic Legal Studies*: Vol. 48 : No. 2 , Article 6.

Available at: <https://scholarship.law.stjohns.edu/jcls/vol48/iss2/6>

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NOTE

THE RIGHT TO WEAR HEADSCARVES AND OTHER RELIGIOUS SYMBOLS IN FRENCH, TURKISH, AND AMERICAN SCHOOLS: HOW THE GOVERNMENT DRAWS A VEIL ON FREE EXPRESSION OF FAITH

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INTRODUCTION

In the school context, the right to manifest belief by wearing religious symbols, especially the Muslim headscarf—or hijab—can often be threatened. This is burdensome when the adherent has a sincerely held belief that wearing certain garb is required by a given religion, as it can lead to great tension between the person's duty to God and his or her duty to follow the laws set forth by the government. It is especially tense in countries like Turkey and France, which have official policies of secularism, and even in the United States, which has a policy of separation of church and state.¹ A major world issue today is the extent to which women have the right to wear a Muslim headscarf—or hijab. In schools, the issue is paramount because the hijab symbolizes different things to different people, and some governments ascribe a meaning to the headscarf from which they wish to protect schoolgirls.

France banned the headscarf along with other “conspicuous” religious symbols in primary and secondary schools in

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¹ See generally T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 420–24 (2004) [hereinafter Gunn, *Religious Freedom and Laïcité*] (discussing the similarities and differences between the French concept of *laïcité* and the policy of separation of church and state in the United States).

controversial Law No. 2004-228, passed in 2004.² Turkey has a long-standing ban on the hijab in schools and government buildings, which was upheld by the European Court of Human Rights ("ECHR") in *Sahin v. Turkey*.³ The U.S. has no such ban against hijab, which would almost undoubtedly fail First Amendment scrutiny.⁴ The right to wear hijab is sometimes

² Law No. 2004-228 of Mar. 15, 2004, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Mar. 17, 2004, p.5190; *see also* Nicole Atwill, *Implementation of Head Scarves Law*, 12 *WORLD L. BULL.* 15, 15-16 (2004), available at <http://www.fas.org/sgp/othergov/wlb/index.html> (follow "December 2004" hyperlink) (discussing the contents of French Law No. 2004-228 of March 15, 2004, as well as some of the practical effects of the law).

³ 2005-XI Eur. Ct. H.R. 173.

⁴ *See* U.S. CONST. amend. I (guaranteeing the right to free exercise of religion). A law that specifically targets student religious dress would be subject to strict scrutiny. *See* *Employment Div. v. Smith*, 494 U.S. 872, 877-78 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997). This would make it very difficult for such a law to pass constitutional muster. A parallel can be drawn between this and religious garb statutes that ban teachers from wearing hijab or other religious articles. In those cases, the shaky ground for the compelling interest is avoiding teacher proselytization; several courts have said that a blanket ban on certain garb is narrowly tailored. Some states in the U.S. restrict the wearing of religious garb by teachers under statutes that originated to prevent priests and nuns from teaching at public schools. For example, the Third Circuit denied the claim of a Pennsylvania teacher who was prevented from teaching class in hijab under such a statute. *See* *United States v. Bd. of Educ.*, 911 F.2d 882, 894 (3d Cir. 1990). Oregon upheld a state religious garb law when it was challenged by a Sikh teacher who had been suspended for wearing a turban to school. *See* *Cooper v. Eugene Sch. Dist.* No. 41, 723 P.2d 298, 381 (Or. 1986). Switzerland's ban on the hijab as worn by public school teachers was upheld by the ECHR in *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 431 (2001), available at <http://echr.coe.int/echr> (follow "Case-Law" hyperlink; then follow "HUDOC database" hyperlink; then select "HUDOC Collection" check block at upper-left corner; then enter "Dahlab v. Switzerland" in "Case Title" field; then select "Search" option). This case is distinguishable from the French law, as the court was concerned with the proselytizing effect teachers wearing such garb may have on students. The ECHR upholds the rights of European countries to create laws protecting against proselytization. *See* *Kokkinakis v. Greece*, App. No. 14307/88, 17 Eur. H.R. Rep. 397, 411-12 (1993). The U.S. does not have the same anti-proselytization laws as Europe, and free expression of religion is highly valued in the U.S., so it is inconsistent that it has been held constitutional to prevent the wearing of a religious symbol that does not somehow threaten the public order or safety. The possibility that a teacher wearing a religious symbol would give the students a sense of the teacher's beliefs and encourage students to ask questions about them should not be considered sufficient reason to disallow the practice. Such a case is very different from the school or teacher actively proselytizing or sponsoring prayer. *See* *Engel v. Vitale*, 370 U.S. 421, 436 (1962) (holding school-sponsored prayer unconstitutional).

impinged upon, however, by various religiously neutral policies⁵ and school dress codes.⁶

The crux of the hijab debate is whether wearing it is a human right and to what extent, and for what reasons, the government may ban it. Part I of this Article will discuss the backdrop of the hijab debate: why women historically have worn it and what it means to both Muslims and outsiders. Part II examines how France's unique history led to its ban of hijab. Part III discusses the ban in secular Turkey, where an ongoing war over the issue continues with the Turkish high courts overturning recent attempts by the legislature to remove the ban in universities.⁷ This Section gives particular attention to the ECHR's *Sahin* decision and where its logic faltered. Part IV shows that while the U.S. does not have a nationwide ban, this issue comes up in schools more than we might realize. This Section explains how the Supreme Court's shift to the neutral and generally applicable test of *Employment Division v. Smith*⁸ in 1990, has left open the possibility of infringing on the right to wear headscarves and suggests the standard under which courts should scrutinize school policies that burden students' freedom to wear religious symbols.

I. THE MEANING OF THE HIJAB

"Hijab" can be a generic term for modest dress in general, but in this Article, it will refer to the most common type of Muslim headscarf—one that is loosely tied around the neck to cover only the neck and hair.⁹ It is distinguishable from the chador, a full body cloak that leaves the face uncovered; the

⁵ In 2008, a Muslim woman in Douglasville, Georgia, was jailed for contempt of court after refusing to remove a hijab in a municipal courthouse where head coverings were prohibited by the judge; upon her release, the judge and police officers were ordered to undergo sensitivity training. See Josh Levs, *Police To Get Training After Head-Scarf Wearer's Arrest*, CNN.COM, Dec. 23, 2008, <http://www.cnn.com/2008/US/12/22/georgia.muslim.courthouse/>.

⁶ See *infra* text accompanying notes 119–121.

⁷ See *Court Annuls Turkish Scarf Reform*, BBC NEWS, June 5, 2008, <http://news.bbc.co.uk/2/hi/europe/7438348.stm>.

⁸ 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 1993 U.S.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

⁹ See *In Graphics: Muslim Veils*, BBC NEWS, http://news.bbc.co.uk/2/shared/spl/hi/pop_ups/05/europe_muslim_veils/html/1.stm (last visited Apr. 5, 2009) (describing and depicting different forms of Muslim veil).

niqab, which covers everything but the eyes; and the burqa, which covers the entire face and body, leaving only a mesh screen in front of the eyes.¹⁰ Some countries make wearing some form of hijab, including the full burqa, mandatory under Sharia law.¹¹ Those laws are only germane to this Article to the extent that the forced wearing of a veil brings to mind oppression of women in the eyes of many Westerners. In an attempt to separate themselves from that model, some countries with large Muslim populations go to the opposite extreme: banning the hijab altogether in certain government buildings and schools. Bans in the schools create problems because in most countries some amount of schooling is compulsory,¹² and under most treaties education is a human right.¹³ When something the student considers fundamental to her belief is banned in the school, she can be cut off from access to education, or at least forced to make a difficult choice between education and the religious belief. Proponents of these bans argue that the bans are actually protecting girls from making this difficult choice; the girls do not have to fight against males who would force them to wear hijab, and they can be free from this pressure when at school. This logic is flawed because many girls may instead end up leaving school altogether because of the bans. This is surely more harmful to girls who are truly susceptible to male oppression at home, as they will then lack the empowerment that education provides. Besides, the pressure to wear the veil will rear its head at home or in other parts of the community regardless of whether students may wear the hijab to school. It is the case, therefore, that hijab bans create the same type of repressive anti-female feelings and fear of the "others" in the outside world that are prevalent in countries like Iran, which force the wearing of the veil. In both cases, the female is marginalized, not trusted to make her own decisions, and given a message that another culture is wrong. "Veiled countries," which mandate headscarves

¹⁰ See *id.*

¹¹ See *A Look at the Wearing of Veils, and Disputes on the Issue, Across the Muslim World*, INT'L HERALD TRIB., Oct. 31, 2006, available at http://www.iht.com/articles/ap/2006/10/31/africa/ME_GEN_Mideast_Veil_Glance.php.

¹² See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (recognizing the power of governments to compel education).

¹³ See, e.g., Convention on the Rights of the Child, G.A. Res 44/25, art. 28, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), available at <http://www.un.org/documents/ga/res/44/a44r025.htm>.

for all, argue that they are trying to protect women from the immorality of the non-Muslim West, and hijab-banning countries argue that they are protecting women from the sexist clutches of Islam.¹⁴ Neither rubric respects the intelligence of the woman, which is especially sad in the school context, where pluralism should be valued.

Some Muslims feel that their religion compels them to wear hijab because of certain verses in the Koran, Islam's holiest scripture.¹⁵ The word "hijab" means "modesty" in Arabic, and wearing of hijab includes conservative clothing along with the headscarf.¹⁶ Hair is fetishized in Islamic culture—to cover a woman's hair is to cover her sexuality, keeping it under control so that she can keep it for the pleasure of only her husband without provoking lustful thoughts in other men.¹⁷ For those who believe it is obligatory, it becomes so at puberty, serving to indicate to the world that although she is now of child-bearing years, the woman is not sexually available.¹⁸ This may be why in Turkey, where the headscarf is banned in primary and secondary schools, students are typically required to attend school only until fifth grade; the peasant girls who are most likely to desire to wear hijab do not protest because they rarely finish school

¹⁴ See Sebastian Poulter, *Muslim Headscarves in School: Contrasting Legal Approaches in England and France*, 17 OXFORD J. LEGAL STUD. 43, 47 (1997) (noting that some people believe certain activities, such as polygamy and female genital mutilation, so depart from minimum Western standards of acceptable behavior that it is proper to intervene in minority cultures to fight them).

¹⁵ See *id.* at 45; see also Mohamed Baianonie, Imam, Friday Speech Delivered at the Islamic Center of Raleigh, N.C. (Jan. 15, 1988), <http://islam1.org/khutub/Hijab.htm>. The issue of whether or not the Koran does in fact mandate hijab is not germane to this Article. It has not been disputed that this is a sincerely held religious belief by those who have taken legal action against the bans, which is all that matters in American and European jurisprudence.

¹⁶ See Norma Claire Moruzzi, *A Problem with Headscarves: Contemporary Complexities of Political and Social Identity*, 22 POL. THEORY 653, 655 (1994).

¹⁷ See Carol Delaney, *Untangling the Meanings of Hair in Turkish Society*, 67 ANTHROPOLOGICAL Q. 159, 161, 164 (1994). This should not be a radical notion to anyone familiar with the other Abrahamic religions. In Orthodox Judaism, some women cover their heads to indicate that they are married. See Adin Steinsaltz, *Hats and Covering the Head: A Traditionalist View*, MYJEWISHLEARNING.COM, http://www.myjewishlearning.com/daily_life/TheBody/Clothing/Headcoverings.htm (last visited Mar. 16, 2009). There are analogous remnants of this in Christianity as well, including the nun's habit, the wedding veil, and the belief of some that the head should be covered by a hat or scarf in church.

¹⁸ See Delaney, *supra* note 17, at 161, 164.

anyway.¹⁹ This system further alienates these women from the public education system. The beauty of the rebellion of women such as Leyla Sahin, who fought Turkey's ban in the ECHR, is that it represents a movement by women who are educated and fighting for their right to "own" the hijab, making it a symbol of female empowerment rather than male domination. Indeed, some Muslim scholars argue that the purpose of the veiling during the time of Muslim prophet Mohammed was to protect women, and that in today's society, education is the equivalent to the headscarf because it helps women protect themselves.²⁰

Some Muslim women do not wear hijab out of a sense of duty but prefer to wear it as a political or cultural symbol. The first woman ever elected to the Turkish legislature, Merve Kavacki, commented that "[b]y covering themselves, Muslim women can be recognized not only for their religious beliefs but for their contributions to society as well; they can be judged for their intellect and not just their appearance."²¹ She lost her position and her Turkish citizenship for wearing the hijab in a government building.²² The bans on hijab in Turkey and France may have only made women more determined to wear it. In February 2008, a newly elected Turkish legislature voted

¹⁹ *Id.* at 167; see also FED. RES. DIVISION, LIB. CONG., TURKEY: A COUNTRY STUDY (Helen Chapin Metz ed., 1995), available at <http://countrystudies.us/turkey/50.htm> (noting that middle school education is also compulsory, but is rarely enforced in rural areas, and thus "it is easier for parents to keep older children, especially girls, at home").

²⁰ See Bahia Tahzib-Lie, *Applying a Gender Perspective in the Area of the Right to Freedom of Religion or Belief*, 2000 BYU L. REV. 967, 977 n.44 (2000).

²¹ Merve Kavakci, *Headscarf Heresy: For One Muslim Woman, the Headscarf is a Matter of Choice and Dignity*, 142 FOREIGN POL'Y 66, 66-67 (2004) [hereinafter Kavakci, *Headscarf Heresy*]. Kavakci argues that while some women in Islamic countries are coerced into wearing the veil, others choose it of their own free will, so Western feminists often "impose . . . prejudice[]" on them when they complain about hijab. See *id.*

²² See *id.* at 66. Kavakci and her family moved to the United States, where she became a professor at the George Washington University. See Clayton McCleskey, *GW Professor Merve Kavakci: A Modern-day Pilgrim*, GW HATCHET, Nov. 24, 2008, available at <http://media.www.gwhatchet.com/media/storage/paper332/news/2008/11/24/Life/Slice.Of.Life.Gw.Professor.Merve.Kavakci.A.ModernDay.Pilgrim-3559559.shtml>. Within two years of the incident, the Turkish government shut down her former political party, deeming it a threat to the secular state. See Kavakci, *Headscarf Heresy*, *supra* note 21.

overwhelmingly to lift the ban in universities,²³ but this statute was invalidated by the courts and caused much political unrest in Turkey.²⁴

II. THE BAN IN FRANCE

Laïcité, the French notion of secularism, stands as one of the cornerstones of the French republic.²⁵ The idea behind *laïcité* is to promote tolerance under a model that separates church from state, so that no religion will be favored over another and church-state conflict can be avoided.²⁶ The Law on the Separation between Church and State is found in the Act of 9 December 1905 and states that: “The Republic . . . shall guarantee free participation in religious worship [unless such participation interferes with] the interest of public order.”²⁷ *Laïcité* was born out of Enlightenment thinking, which presented religion as dogmatic and intolerant.²⁸ To the French, the classic values of equality, fraternity, and liberty support a notion that ethnic and religious distinctions are relegated to the private sphere by design.²⁹ Immigrants are welcome as long as they are seen as becoming “French”—they are even offered French language and culinary appreciation courses.³⁰ This presents a problem for many French-Muslim immigrants, because Islam is a way of life that permeates the mundane through dietary laws, styles of

²³ See Dorian Jones, *Turkey Moves To Lift Ban on Headscarves at Universities*, VOICE OF AMERICA, Feb. 7, 2008, <http://www.voanews.com/english/archive/2008-02/2008-02-09-voa3.cfm?CFID=13435284&CFTOKEN=53779731>.

²⁴ See *infra* notes 110–113 and accompanying text.

²⁵ See Gunn, *Religious Freedom and Laïcité*, *supra* note 1, at 428.

²⁶ See *id.* at 429.

²⁷ See *Dogru v. France*, App. No. 27058/05, Eur. Ct. H.R. para. 18 (Dec. 4, 2008), available at <http://www.echr.coe.int/eng> (follow “Case Law” hyperlink; then follow “HUDOC” hyperlink; then search “Application Number” for “27058/05”; then follow the Word Document hyperlink) (citing Law on the Separation of Churches and the State of Dec. 9, 1905, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 11, 1905, p. 7205) (internal quotation marks omitted).

²⁸ See Dominique Custos, *Secularism in French Public Schools: Back to War?* *The French Statute of March 15, 2004*, 54 AM. J. COMP. L. 337, 345–46 (2006).

²⁹ See Poulter, *supra* note 14, at 50.

³⁰ See Christina A. Baker, Note, *French Headscarves and the U.S. Constitution: Parents, Children, and Free Exercise of Religion*, 13 CARDOZO J.L. & GENDER 341, 343 (2007). In 1990, the French government created the Council for the Reflection of Islam to help integrate Muslims into French society. See Cynthia DeBula Baines, Note, *L’Affaire des Foulards—Discrimination, or the Price of a Secular Public Education System?*, 29 VAND. J. TRANSNAT’L L. 303, 312–13 (1996).

dress, daily prayer rituals, and so on.³¹ In some Muslim countries, what is “of the world” is considered sinful compared to what is “of Islam,” so it may be quite the culture shock when their citizens immigrate to France.

President Jacques Chirac signed the French ban on students wearing conspicuous religious symbols into law on March 14, 2004.³² Soon thereafter, the U.S. Commission on International Religious Freedom opined that with this ban, France was probably violating the European Convention on Human Rights.³³ The ECHR has yet to hear a case on the French law, but there is strong evidence to suggest that the court would uphold it.³⁴ The court noted the existence of the law, without condemnation, in *Sahin*, discussing it among the laws of other European countries, some of which allow the hijab and some of which do not. This was part of a greater point about the wide latitude countries should have in decision making as part of the “margin of appreciation,” which it considered especially appropriate with respect to wearing religious symbols.³⁵ In fact, in 2008, the Court held in *Dogru v. France*³⁶ that there was no violation of Article 9 of the European Convention, which provides for the right to manifest one’s religious beliefs,³⁷ when Belgin Dogru was

³¹ See Baines, *supra* note 30, at 311.

³² The law states, as translated: “In public elementary schools, junior high schools and high schools, students are prohibited from wearing symbols or clothing through which they conspicuously evince a religious affiliation. The internal regulations [of the schools] require disciplinary procedures to be preceded by a dialogue with the student.” Custos, *supra* note 28, at 360 (internal quotation marks omitted).

³³ Press Release, U.S. Commission on International Religious Freedom, France: Proposed Bill May Violate Freedom of Religion (Feb. 3, 2004), available at http://www.uscirf.gov/index.php?option=com_content&task=view&id=318&Itemid=51 (“The French government and legislature should be urged to reassess this initiative in light of its international obligations to ensure that every person in France is guaranteed the freedom to manifest his or her religion or belief in public, or not to do so.”); see also Baker, *supra* note 30, at 341.

³⁴ See Kathryn Boustead, *The French Headscarf Law Before the European Court of Human Rights*, 16 J. TRANSNAT’L L. & POL’Y 167, 189–96 (2007) (analyzing a hypothetical ECHR case on the French ban and concluding that the ECHR would probably find it an interference with manifestation of religion that is justifiable under the same legitimate aims of maintaining public order and protecting the rights of others that were considered in *Sahin*).

³⁵ See *Sahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, 204 para. 110.

³⁶ App. No. 27058/05 (2008), available at <http://www.echr.coe.int/eng> (follow “Case Law” hyperlink; then follow “HUDOC” hyperlink; then search “Application Number” for “27058/05”; then follow the Word Document hyperlink).

³⁷ *Id.* para. 72.

expelled from a French school for wearing a headscarf during physical education ("P.E.") and sports classes.³⁸ This case is not exactly on point, as the French law bans religious symbols from all classrooms, not just P.E. classrooms, where there is a more reasonable need to disallow headscarves. The opinion in *Dogru*, however, discussed the law in approbatory terms and can be interpreted as granting broad support for it.

Dogru's allegations were based on events that occurred in 1999, before the French law of 2004 was enacted, when she was eleven years old.³⁹ A teacher reported her to the headmaster when she refused to remove her scarf in P.E. class. Dogru was subsequently expelled for breaching the duty of assiduity because she failed to actively participate in class.⁴⁰ On appeal, the Director of Education for Caen and the Caen Administrative Court upheld the school's decision, the latter finding that Dogru's "attitude had created an atmosphere of tension within the school."⁴¹ The Nantes Administrative Court of Appeal and the *Conseil d'Etat*, the highest administrative court in France, each rejected an appeal as well.⁴² The expulsion was upheld despite the girl's proposal to wear a hat or balaclava⁴³ instead of a headscarf.⁴⁴ The ECHR said that she "willfully infringed"⁴⁵ upon school rules and that her proposed compromise was not enough, especially since the school had attempted to open up a dialogue with her.⁴⁶ The use of the word dialogue is misleading. The ECHR noted that under French law, when there is a conflict regarding religious garb in school, teachers should immediately seek a dialogue with the student and his or her parents; this "dialogue," according to a 1989 circular by the Minister for

³⁸ *Id.* para. 8.

³⁹ *See id.* para. 6.

⁴⁰ *See id.* paras. 7–8.

⁴¹ *Id.* paras. 10–13.

⁴² *Id.* paras. 14–16.

⁴³ A balaclava is a tight wool cap that covers the whole head and can leave the face uncovered, similar to a ski mask. *See Balaclava (clothing)*, http://en.wikipedia.org/wiki/Ski_mask (redirect to Balaclava (clothing)) (last visited Jan. 8, 2009). The item has no loose pieces that could cause asphyxiation or get in the way of physical activity, therefore, there is no safety reason for a school not to allow its use during P.E. class. In fact, a balaclava is commonly used in a variety of athletic endeavors. *See id.*

⁴⁴ *See Dogru*, App. No. 27058/05, para. 13.

⁴⁵ *Id.* para. 38.

⁴⁶ *See id.* para. 39.

Education, shall be implemented so that “the pupil agrees to stop wearing the sign(s) in question.”⁴⁷ Thus, the dialogue appears to be a pretext for bullying the student and parents into giving up their argument. The school argued, and the court agreed, that because it made a conciliatory effort and allowed her to wear scarves in regular classes, Dogru should have compromised by not wearing a head covering during P.E.⁴⁸ Certainly, the health and safety concerns regarding the wearing of a loosely tied headscarf in a P.E. class are legitimate. This position is culturally insensitive, however, because to some pubescent Muslim girls, appearing in public without a head covering is akin to being naked, which is a compromise on modesty that the devout are not willing to make. Dogru’s willingness to wear a hat instead of a headscarf demonstrates that this was an issue of modesty for her, not an attempt to foist a political symbol onto others or otherwise interfere with school activities, as the court implies.⁴⁹ A hat is not a conspicuous religious symbol, nor would it evince any religious belief, so it cannot have constituted an act of pressure or proselytism.

The court also noted that there was a public order disturbance and a “general atmosphere of tension”⁵⁰ because the incident caused some teachers to strike in defense of secularism, even though the disorder originated with the teachers and the student “had not engaged in any form of proselytism.”⁵¹ In deciding that Dogru’s right to manifest her religious beliefs had not been infringed, the court explained that “an attitude which fails to respect that principle [of secularism] will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention.”⁵² The court correctly noted that it was not unreasonable to make a student remove the headscarf during sport activities and stated that the expulsion was “merely” the consequence of Dogru’s non-compliance with the rules and not of

⁴⁷ See *id.* para. 27.

⁴⁸ See *id.* para. 39.

⁴⁹ See *id.* (“Apart from the disruption of physical education and sports classes, the authorities had legitimate grounds to fear that the pupil’s behaviour would interfere with order in the school or the normal functioning of the State education service.”).

⁵⁰ *Id.* para. 74.

⁵¹ *Id.* para. 44.

⁵² *Id.* para. 72.

her religious convictions.⁵³ This view is overly simplistic given that expulsion from school is a very serious consequence. Moreover, since the girl said that she would wear a hat instead of a headscarf, it does, in fact, appear that she was punished for her religious conviction that her head must be covered in public. The court brushed off deciding whether the school was unreasonable as to the student's proposed compromise, stating simply that it fell into the "margin of appreciation" enjoyed by the state.⁵⁴ The court also held that Dogru had not been deprived of her right to education under Article 2 of the Convention because she had completed her education through correspondence courses and, in any case, the right to education does not prohibit disciplining a student who fails to follow the rules because schools have the power to "develop[] and mould[] . . . the character and mental powers of its pupils."⁵⁵

The language used by the ECHR indicates a likelihood of support for the French law in its entire application, not just in the limited area of physical education classes. The court focused on the headscarf as a disruption that causes tension in school without really discussing the numerous practical reasons why a headscarf would be dangerous in a P.E. class, such as its potential to cause asphyxiation or trip up a student. This implies that the ECHR was more concerned with broader issues involving religious symbols in schools—the same issues that inform the French law. This allowed the court to demonstrate support for the controversial law without actually issuing a decision on it.

The French law allows students to wear inconspicuous symbols such as small Stars of David and crosses or crucifixes, but not items such as a yarmulke, hijab, or turban, which are material to the Jewish, Muslim, and Sikh faiths. This suggests that France bears an animus towards these religions. Specifically, the feeling among some spectators is that the law represents anti-Islamic beliefs.⁵⁶ France, reportedly, has the highest Muslim population in all of Europe and tensions within

⁵³ *Id.* para. 73.

⁵⁴ *See id.* para. 75.

⁵⁵ *See id.* paras. 79–83.

⁵⁶ *See Baker, supra* note 30, at 341 (summarizing international press reactions, which characterize the ban as anti-Islamic).

the community are high.⁵⁷ Muslims in France face high unemployment rates leading to ghettoization in housing, which fuels fundamentalism and unites the Muslims in their religion, rather than integrating them into French culture.⁵⁸

The lobbying effort behind the law supports the notion that the French law is anti-Islamic in nature. A group of female French philosophers sent an open letter to President Chirac supporting the ban, claiming that "the Islamic veil sends us all—Muslim and non-Muslim—back to a discrimination against women that is intolerable,"⁵⁹ which suggests that a voluntary manifestation of belief in a major world religion can symbolize discrimination. Feelings about the headscarf are no doubt fueled by reactions to *l'affaire du foulard* ("the affair of the headscarves"), a 1989 incident in which three Muslim girls were suspended from a French public secondary school in the town of Creil for wearing headscarves but were eventually readmitted to class by the national Minister of Education.⁶⁰ The Minister suspended the girls because he was concerned with the assertion of religious rights by other minorities, including Jews who were absent from classes on Saturdays.⁶¹ *L'affaire* sparked national debate, pitting right-wing politicians who were concerned about fundamentalist Islam against liberals who were split between support for the girls and feelings that a secular school system could "save[]" the girls from the oppression of hijab.⁶² Polls from 1989 show that many French thought the headscarf was a symbol of "conquering Islam" and that the education ministry was too soft on the issue; they believed this "amount[ed] almost to the abandonment of its duty to protect secular French culture

⁵⁷ See Baines, *supra* note 30, at 313 (noting also that in 1995, the French government officially recognized Islam as the country's second largest religion after Catholicism).

⁵⁸ See *id.* at 313–14 (detailing many incidents of racially and religiously driven violence in the Muslim majority, former French colony of Algeria, causing fear of Muslim fundamentalism in France).

⁵⁹ See Kavakci, *Headscarf Heresy*, *supra* note 21, at 67 (internal quotation marks omitted).

⁶⁰ See Moruzzi, *supra* note 16, at 653, 657–58.

⁶¹ See Poulter, *supra* note 14, at 57.

⁶² See *id.*

and identity.”⁶³ The incident caused riots in France, emphasizing the line that divides Muslim immigrants from the rest of French society.⁶⁴

It is surprising to know that after *l'affaire*, several French court cases struck down school and university bans on religious insignia in general and hijab in particular.⁶⁵ For instance, the *Conseil d'État* struck down a blanket ban by a school district on the wearing of “any distinctive religious sign” because the terms of the ban were too general.⁶⁶ The *Conseil* also struck down penalties for wearing headscarves in school where the school could not establish that wearing the headscarves constituted “an act of pressure or proselytism or [some other interference with] public order.”⁶⁷ When France asked the *Conseil* for an opinion, the court responded that wearing religious garb in school is “not . . . incompatible with the principle of secularism” as long as these expressions of faith do not “constitute a form of pressure, provocation, proselytism or propaganda” “in the circumstances in which they are worn;” the court further noted that religious symbols may be subject to rules only “if necessary.”⁶⁸ The court left it up to schools to determine their own policies and decide whether an individual incident constitutes such an act.⁶⁹ The recent French law, which bans any symbols that immediately identify the wearer’s religious affiliation,⁷⁰ implies that items that evince a religious affiliation in and of themselves constitute such pressure, proselytism, or propaganda.⁷¹ Indeed, proselytization through such symbols is

⁶³ Pierre Bréchon & Subrata Kumar Mitra, *The National Front in France: The Emergence of an Extreme Right Protest Movement*, 25 COMP. POL. 63, 76–77 (1992).

⁶⁴ See Baines, *supra* note 30, at 324–25 (suggesting that French Muslims, like French Catholics, should get state funding for their own private religious schools where girls can wear hijab without incident).

⁶⁵ See Poulter, *supra* note 14, at 60 (discussing the cases).

⁶⁶ See *Dogru v. France*, App. No. 27058/05, Eur. Ct. H.R. para. 29 (Dec. 4, 2008), available at <http://www.echr.coe.int/eng> (follow “Case Law” hyperlink; then follow “HUDOC” hyperlink; then search “Application Number” for “27058/05”; then follow the Word Document hyperlink).

⁶⁷ *Id.*

⁶⁸ *Id.* para. 26.

⁶⁹ See *id.* para. 56; see also Cindy Skach, International Decisions, *Sahin v. Turkey: Teacher Headscarf Case*, 100 AM. J. INT’L L. 186, 191 (2006).

⁷⁰ *Dogru*, App. No. 27058/05 at paras. 30–31.

⁷¹ See *id.* para. 29.

one of the official reasons given for passing the law.⁷² In this way, the French legislature subverts the intentions behind the *Conseil's* decisions, which afforded greater protection to the right of Muslim schoolgirls to wear hijab precisely because circumstances may vary.

As the French legislature considered passing the law, Chirac commissioned a report from French Ombudsman Bernard Stasi, who found in favor of banning the expression of religious or political beliefs in schools.⁷³ At least one member of the Stasi Commission reported that it had originally planned to affirm the findings of the *Conseil d'État*, but its members were moved by the stories of women who testified at the hearings—Algerian immigrants, for example, reported that when they came to France they enjoyed having the freedom not to wear headscarves but later felt a lot of pressure from husbands and brothers to do so.⁷⁴ Commission members also responded to testimony from women who claimed they were subjected to physical attacks in French-Muslim ghettos for choosing not to wear the headscarf. One story came from Samira Bellil, who became a local celebrity after writing a book about being gang-raped by young Muslim males who objected to her modern style of dress.⁷⁵ The Commission concluded that “the country needed a political answer to what appeared to be a political threat” and passed the statute in 2004.⁷⁶ Forty-eight students were expelled for wearing religious symbols during the first academic semester after the law’s enactment.⁷⁷

⁷² See Poulter, *supra* note 14, at 61 (discussing laws that were previously suggested).

⁷³ See Boustead, *supra* note 34, at 189.

⁷⁴ See Olivier Dutheillet de Lamothe, *The French Headscarf Case: Why Girls Cannot Legally Wear Headscarves in French Public Schools* 3 (July 10, 2006) (unpublished seminar paper, on file with author).

⁷⁵ See Steven G. Gey, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, 42 HOUS. L. REV. 1, 14–16 (2005).

The new French law banning headscarves in public schools must be understood in part as a response to these attacks on Muslim women in the *banlieues*—attacks that are fueled by hopelessness, poverty, and a generally violent atmosphere, as well as by a culture informed by the strict sexual mores of religious fundamentalists.

Id.

⁷⁶ Dutheillet de Lamothe, *supra* note 74, at 4.

⁷⁷ Boustead, *supra* note 34, at 189.

Reactions to the law have been mixed. One commentator said that what is going on in France currently is a type of “*fundamentalist . . . laïcism*,” driven by “illiberal and somewhat Islamophobic” principles.⁷⁸ On the other hand, sixty-nine percent of French citizens support the law, including forty-two percent of French Muslims.⁷⁹ This did not, however, stop segments of the French Muslim population from rioting in 2005 because of the disenfranchisement they felt over issues such as the headscarf ban and unemployment conditions.⁸⁰

While pressure to wear the veil and subsequent physical attacks on dissenting women are very real problems, they are in large part born out of the poverty and racism French Muslims face.⁸¹ These factors also tend to be the very things that compel many schoolgirls to wear the headscarf.⁸² In fact, one member of the Stasi Commission, Hanifa Cherifi, found that most of the “headscarf militant” girls she knew wore hijab against their parents’ wishes rather than because of family pressure.⁸³ As one young woman said, “[My parents] told me the most important thing was that I integrate into French society, but I stuck my ground, because the veil symbolises my relationship with God.”⁸⁴ Other girls wear it with a sense of rebellion: according to one teacher, they combine a traditional hijab with “sexy clothes, figure hugging trousers and the like. For these girls wearing the head scarf is a fashion and a way of asserting their Arab identity.”⁸⁵ Such displays may appear to undermine the true

⁷⁸ Tore Lindholm, *The Strasbourg Court Dealing with Turkey and the Human Right to Freedom of Religion or Belief: A Critical Assessment in the Light of Recent Case Law 3* (unpublished seminar paper), available at <http://www.strasbourg.conference.org/papers.php>. This Article even goes so far as to suggest that *Sahin* was decided in favor of secular principles because the ECHR is situated in Strasbourg, France. See *id.*

⁷⁹ Baker, *supra* note 30, at 341 n.7.

⁸⁰ See Skach, *supra* note 69, at 191 n.12.

⁸¹ See Gey, *supra* note 75, at 14–15.

⁸² See *id.* at 15.

⁸³ Nusrat Choudhury, *From the Stasi Commission to the European Court of Human Rights: L’Affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls*, 16 COLUM. J. GENDER & L. 199, 224 (2007). Note that Cherifi supports the French ban. See *id.*

⁸⁴ Hannah Godfrey, *Schools’ Bid for Headscarf Ban Widens French Divide: Crackdown Exposes the Fissures Between State and Religion*, Reports Hannah Godfrey, THE OBSERVER, June 15, 2003, at 22 (internal quotation marks omitted).

⁸⁵ *Id.* (quoting French school teacher Sophie Eliard) (internal quotation marks omitted).

purpose of hijab—modesty. It is not the province of the secular state, however, to interpret the tenets of Islam. The state's only concern would be whether the adherent has a sincerely held religious belief. Thus, in France, the headscarf can be seen as more than a religious symbol or a tool of oppression. It can also be a representation of "ethno-cultural identity"—in this respect, it is worn in solidarity and in protest against the racism, exclusion, and anti-Islam sentiment that some feel is rampant in France.⁸⁶ In fact, the number of headscarves in French schools increased during the Iraq war.⁸⁷ Combating poverty and ghettoization of Muslims by integrating them into French society in a culturally respectful way would be more conducive to protecting women than a blanket ban on conspicuous religious symbols. The ban has not slowed the escalating racial tension in France and forcing Muslim students out of school only further excludes them from education and employment options. At best, the ban forces them into private Muslim schools where they will continue to be isolated from French culture. This will only prolong the violence and poverty facing Muslims in the French ghettos.

II. THE BAN IN TURKEY

A. *History*

Turkey has no state religion, but since Muslims are in the majority in Turkey,⁸⁸ one would think that it would be a safe haven for women and girls wishing to wear a headscarf. Instead, Turkey's restrictions on the headscarves are among the most stringent in Europe. We should examine very carefully the rationale for Turkey's hijab ban before dismissing it as disproportional to perceived threats. Turkey is unlikely to have the same animus against Muslims that France is accused of having. In Turkey, Muslim women wearing headscarves are not "others." They are perhaps the wives, mothers, and daughters of the legislators—although not the legislators themselves, because any elected females cannot wear the headscarf in government

⁸⁶ See Choudhury, *supra* note 83, at 248–49.

⁸⁷ Godfrey, *supra* note 84.

⁸⁸ Ninety nine percent—or 68 million out of 68.7 million Turkish inhabitants—are Muslim. *Muslims in Europe: Country Guide*, BBC NEWS, Dec. 23, 2005, <http://news.bbc.co.uk/2/hi/europe/4385768.stm> (citing 2003 census figures).

buildings.⁸⁹ It is difficult to estimate the number of women disenfranchised and deterred from education and employment opportunities in Turkey because women have not been able to take the Civil Service Appointments Examination and University Entrance Examination in headscarves since 2000 and 2002, respectively. Nevertheless, a December 2008 AK-DER study estimates that over ten thousand civil servants and one hundred thousand students have been forced out of their institutions.⁹⁰ According to a survey in the same study, 20.8% of Turkish women said the headscarf kept them from being employed, 17.8% were forced to work in jobs where they would have no contact with the public, and 17.1% ended up working in a job outside their regular profession because of the headscarf.⁹¹ The headscarf is banned in schools of all levels, including private schools, which are subject to the same laws.⁹²

Modernism has been a guiding force behind Turkish values since the country's founding in the 1920s. The founder of the Turkish Republic, Mustafa Kemal Atatürk, was a reformer "for whom 'modern' meant 'Western' . . . [and who] spent a lot of time trying to get women to uncover."⁹³ Atatürk banned males from wearing a fez, urging them to wear a Western-style brimstone hat instead, and brought along his "uncovered" wife and assistants as he gave lectures asking Turkish women to become modern.⁹⁴ He then suggested a ban on hijab for civil service employees in government buildings as well as students in all schools, including universities.⁹⁵ Today, modernism continues to be an important value in Turkish society.⁹⁶ Turkey is staunch in proving itself, at least in perception, as a secular democracy not

⁸⁹ See the example of Merve Kavakci, *supra* text accompanying notes 21–22.

⁹⁰ AK-DER, A STATISTICAL EXAMINATION OF THE CONDITION OF WOMEN IN TURKEY AND THE IMPACT OF THE HEADSCARF BAN ON TURKEY'S GENDER EQUALITY RANKING, at pt. III.1 (2008), available at <http://www.ak-der.org/?p=reports&view=detail&tbl=rpt&cid=100&cnm=35&lang=eng&m=a8445719836f2d5e8b51986410e14728> [hereinafter AK-DER, Turkey's Gender Equality Ranking]. AK-DER is a non-governmental organization in Special Consultative Status with the Economic and Social Council of the U.N.

⁹¹ *Id.*

⁹² See *id.* at Part II.1.

⁹³ Delaney, *supra* note 17, at 159.

⁹⁴ *Id.*

⁹⁵ See *id.*

⁹⁶ See Q&A: Turkey's EU Entry Talks, BBC NEWS, Dec. 11, 2006, <http://news.bbc.co.uk/2/hi/europe/4107919.stm>.

to be confused with other Muslim majority countries or Sharia states.⁹⁷ One major reason for this mindset may be that Turkey is eager to join the European Union ("EU").⁹⁸ One step to assimilating itself into European legal culture was signing on to the European Convention of Human Rights ("European Convention"), which makes it subject to the decisions of the ECHR.⁹⁹

Some argue that Turkish *laik*, Turkey's version of secularism or *laïcité*, was imposed not by a democratic process, but by military coups, and is not really what the people want.¹⁰⁰ The headscarf ban itself has its origins in a 1980 *coup d'état* that saw a military junta come to power, institute the headscarf laws in 1981, and continually block the attempts of democratically elected governments to reverse the ban.¹⁰¹ In 1985, the Disciplinary Regulation for Students in Higher Education was amended to add a punishment for students who appeared in a headscarf. Then, in 1987, a law granting amnesty to those students was vetoed by the President.¹⁰² The government later passed an amendment to the Law on Higher Education that would allow students to cover the neck and hair for religious reasons, but it was annulled by the Constitutional Court in 1989 on the ground that it was a breach of the principle of secularism that threatened the unity of the state, security, and public order.¹⁰³

⁹⁷ See Opinion, *Turkey's Democracy*, INT'L HERALD TRIB., May 3, 2007, <http://www.iht.com/articles/2007/05/03/opinion/edturk.php>.

⁹⁸ See Q&A: *Turkey's EU Entry Talks*, *supra* note 96 (noting Turkey's forty-year courtship of the European Union).

⁹⁹ See *id.* (noting that progress on human rights was a provision for Turkey to be considered for EU membership).

¹⁰⁰ See Lindholm, *supra* note 78, at 12.

¹⁰¹ T. Jeremy Gunn, *Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights* (July 4, 2005), available at <http://www.strasbourg.conference.org/papers.php>. [hereinafter Gunn, *Fearful Symbols*].

¹⁰² Human Rights Watch, Memorandum from Human Rights Watch to the Turkish Government on Human Rights Watch's Concerns with Regard to Academic Freedom in Higher Education, and Access to Higher Education for Women who Wear the Headscarf 27 (June 29, 2004), http://www.hrw.org/legacy/backgrounders/eca/turkey/2004/headscarf_memo.pdf [hereinafter Memorandum].

¹⁰³ See *id.*

The power struggle over the headscarf continues today. In 2008, the AK Party used its power to enact Law No. 5735, a parliamentary amendment overturning the ban in universities.¹⁰⁴ The amendment was officially approved by President Abdullah Gül on February 22, 2008.¹⁰⁵ By June, the Constitutional Court of Turkey struck down the amendment as a violation of the Constitution's Article 2 secular principles, despite a finding by the court's rapporteur that the case should have been dismissed on a procedural basis.¹⁰⁶ Part of the Turkish court's rationale was that lifting the ban could lead to "social conflicts between Muslims who cover their heads and those who do not by using the headscarf as a political symbol" because "[i]t is impossible to preserve social order once religions begin to dominate the political structure[] and start forming the basis of the legitimacy of legal norms."¹⁰⁷ The court, however, did not cite any examples of such conflicts in preceding months. It inaccurately relied on the ECHR's decision in *Sahin*, which stands for the proposition that Turkey's headscarf ban is not an infringement of religious beliefs—however, this only indicates that the ban is permissible, not mandatory.¹⁰⁸ Commentators have disagreed with the Constitutional Court, asserting that "[d]eclaring that this amendment is contrary to the Constitution conflicts with the principle of equality."¹⁰⁹

The court did not stop at ruling on the headscarf ban. It also criticized the AK Party in the decision, stating that "[t]he proposal and passage of the law, which changed the Constitution in order to allow the wearing of the headscarf in universities,

¹⁰⁴ See Adnan Küçük, Op-Ed., *With Court's Ruling Religious Freedoms Can Be Restricted, but Not Expanded*, TODAY'S ZAMAN, Nov. 2, 2008, <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=157575&bolum=109>.

¹⁰⁵ See Turkey: *Constitutional Court Ruling Upholds Headscarf Ban*, HUM. RIGHTS WATCH, June 5, 2008, <http://www.hrw.org/en/news/2008/06/05/turkey-constitutional-court-ruling-upholds-headscarf-ban>.

¹⁰⁶ See *id.*

¹⁰⁷ *Muscling in on Parliament's Turf*, HÜRRİYET, Oct. 23, 2008, available at <http://arama.hurriyet.com.tr/arsivnews.aspx?id=-639341> (internal quotation marks omitted).

¹⁰⁸ See Ergun Özbudun, Op-Ed., *Reasoning for Headscarf Decision: New Constitution Is Now a Must*, TODAY'S ZAMAN, Oct. 26, 2008, <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=156932>. The court also invoked the ECHR's decision in *Dahlab*, which is distinguishable on the basis that *Dahlab* involved a schoolteacher, that is, a representative of the state itself, rather than a university student. *Id.*

¹⁰⁹ Küçük, *supra* note 104.

means that the party adopted and has become a focal point of anti-secular activities,” and “[i]t is undeniable that the actions of the party, which is considered anti-secular because of its abuse of religion and religious feelings, hinder democracy and have raised questions about the legitimacy of the constitutional order by alienating the society from the state and politics.”¹¹⁰ In fact, after the ban was reinstated, up to seventy-one AK members, including Prime Minister Recep Tayyip Erdogan and President Gül, faced bans for belonging to the party.¹¹¹ In July 2008, the AK Party survived by a single vote of the Constitutional Court, receiving six out of the necessary seven votes to ban it.¹¹² The party nevertheless faced steep penalties, as the court slashed half its treasury funding for 2008 and issued a “serious warning” to the party for steering the country in too religious a direction.¹¹³

Given that even Turkey’s government has often considered the problems inherent in the headscarf ban, such a wide margin of appreciation should not have been granted by the *Sahin* court.¹¹⁴ Instituting a ban on headscarves by a military junta and nearly dismantling a democratically elected political party just for attempting to undo the ban are just the types of government action that the ECHR is supposed to penalize to keep human rights intact and keep governments accountable. If Turkey did not want this type of scrutiny, it should not have signed on to the European Convention. The ECHR did Turkey a disservice by bending over backwards to justify the country’s law.

The rationale of “secularism” is highly suspect when the government has a Department of Religious Affairs that takes a heavy-handed approach towards Islam. Among the department’s duties are writing sermons, appointing clergy, and controlling the building of mosques.¹¹⁵ In 2001, the United Nations (“U.N.”)

¹¹⁰ ‘AKP Abused Religious Beliefs,’ *Top Court Says*, HÜRRİYET, Oct. 25, 2008, available at <http://arama.hurriyet.com.tr/arsivnews.aspx?id=639521> (internal quotation marks omitted).

¹¹¹ Sabrina Tavernise, *Bid To Allow Head Scarves in Top Turkish Court*, N.Y. TIMES, June 6, 2008, at A6. (“The head-scarf amendment is considered to be the single most important irritant that set off the case to ban Mr. Erdogan and seventy other AKP members, and it is central to the prosecution’s argument that he and his allies are trying to dismantle secularism in Turkey . . .”).

¹¹² Sabrina Tavernise & Sebnem Arsu, *Court Declares Turkey’s Ruling Party Constitutional but Limits Its Financing*, N.Y. TIMES, July 31, 2008, at A6.

¹¹³ *Id.* (internal quotation marks omitted).

¹¹⁴ See *Sahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, 197–98 para. 81.

¹¹⁵ Gunn, *Fearful Symbols*, *supra* note 101, at 17–18.

Special Rapporteur questioned whether Turkey was truly secular, noting the power of the Department, and saying that the headscarf ban was not proportional to “legitimate concerns over the political exploitation of religion.”¹¹⁶ Due to the same concerns, the Turkish government mandates that Sunni Islam be taught in all the schools—this began after the same 1980 military coup that resulted in the hijab ban.¹¹⁷

B. Sahin

There was some debate in the ECHR opinion in *Sahin* over whether the scarf was actually banned by law.¹¹⁸ In fact, there is no official law “banning” headscarves, but rather the provisions in question come from the dress code for federal employees and university students.¹¹⁹ Often, someone new will take over a university and change or begin enforcing the dress code, which is how students like Sahin can be undisturbed for months or years and one day, suddenly be asked to take the headscarf off.¹²⁰ This creates a lot of uncertainty for young women studying in Turkey, some of whom have had trouble completing a degree.¹²¹

Sahin, age twenty-four, had worn her headscarf during the first four years of her education at the University of Bursa, but upon her enrollment at the University of Istanbul’s medical school, the vice-chancellor issued a declaration stating that students with head-coverings or beards—common to the Sikh

¹¹⁶ Memorandum, *supra* note 102, at 32 (quoting The Secretary-General, *Interim Report of the Special Rapporteur of the Commission on Human Rights on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, para. 131, delivered to the General Assembly, U.N. Doc. A/55/280/Add. 1, at 3 (Aug. 11, 2000)) (internal quotation marks omitted).

¹¹⁷ Gunn, *Fearful Symbols*, *supra* note 101, at 17.

¹¹⁸ See *Sahin*, 2005-XI Eur. Ct. H.R. at 197–98.

¹¹⁹ Merve Kavakci, *Turkey’s Fashion Police*, 145 FOREIGN POL’Y 16, 16 (2004).

¹²⁰ See *Sahin*, 2005-XI Eur. Ct. H.R. at 181.

¹²¹ Note that *Sahin* was not the first time the European Court ruled in favor of Turkey on a hijab question. In 1993, the European Commission of Human Rights, the predecessor to the current ECHR, held inadmissible a petition by a Turkish public university student who was denied a diploma because she wore the hijab in her identification picture, reasoning that the hijab hindered proper identification. See generally *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm’n H.R. Dec. & Rep. 93 (1993). Although some sort of compromise would have been preferable, this decision is not as objectionable as *Sahin* and can be compared to a Florida case where a Muslim woman was not allowed to take a driver’s license photo in a scarf which covered her face, and the court held that the requirement to remove the scarf did not substantially burden her. See *Freeman v. Dep’t of Highway Safety & Motor Vehicles*, 924 So.2d 48, 56–57 (Fla. Dist. Ct. App. 2006).

religion—must no longer be allowed to attend courses.¹²² She was denied entrance to exams, issued warnings, and ultimately suspended after taking part in demonstrations.¹²³ Turkey strengthened its dress code policy by issuing section 13(b) of Law No. 2547, the Higher Education Act, giving university chancellors the “power to regulate students’ dress for the purposes of maintaining order.”¹²⁴ Amnesty was granted to Sahin and similarly situated students by Law No. 4584 in June 2000.¹²⁵

Although the Court held that limiting the right to wear the hijab via the dress code interfered with Sahin’s right to manifest her religious beliefs under Article 9(1) of the European Convention,¹²⁶ it ultimately found that the interference was justified under the three-prong “legitimate state interest” test of Article 9(2). Here, the interference was justified because the restriction was held to be prescribed by law;¹²⁷ it was in the pursuit of legitimate aims—in this case, protection of the rights and freedoms of others and protection of public order¹²⁸—and it was necessary in a democratic society.¹²⁹

¹²² Skach, *supra* note 69, at 186–87.

¹²³ *Sahin*, 2005-XI Eur. Ct. H.R. at 182.

¹²⁴ *Id.* at 182.

¹²⁵ *Sahin v. Turkey*, App. No. 44774/98 Eur. Ct. H.R. 299, para. 24 (June 29, 2004) (Chamber Judgment).

¹²⁶ *Id.* para. 71. article 9 of the Convention provides:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

¹²⁷ See *Sahin*, App. No. 44774/98, at paras. 72–81. The fact that the headscarf ban came into play by military coup was glossed over by the Court, who simply said that the ban had “existed for a number of years.” *Id.* para. 112; see also Gunn, *Fearful Symbols*, *supra* note 101, at 6–14 (re-writing this section of the ECHR *Sahin* decision and adding in facts about the ban’s history that were omitted by the court).

¹²⁸ See *Sahin*, App. No. 44774/98, at paras. 82–84 (June 29, 2004).

¹²⁹ See *id.* paras. 97–115.

“Necessity” implies proportionality, as limitations on religious freedom should be invoked only to the extent that they preserve order.¹³⁰ The ECHR accepted Turkey’s contention that it was necessary in the interests of secularism and gender equality to ban the hijab, but the Court did not point to a single other country in the world that considered it necessary to ban the headscarf in universities.¹³¹

1. Gender Equality

The Court’s agreement with Turkey’s gender equality rationalization for the ban is dubious given that a large number of women will be excluded from education and government jobs due to their choice to wear the hijab.¹³² While the policy applies to both sexes because it does not allow men to grow beards or wear a turban, it mostly impacts women. Since the hijab is seen by some as a powerful religious symbol, the court analyzed the impact it may have on those who choose not to wear it.¹³³ The court did not go into much detail here, showing great deference to Turkey’s arguments and finding it sufficient to note that “[we] do[] not lose sight of the fact that there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts.”¹³⁴ Critics of the ECHR say that the headscarf issue is merely a pretext that symbolizes the real concern: that extremists will take over the country and Turkey, like its

¹³⁰ See *id.* para. 103.

¹³¹ See Gunn, *Fearful Symbols*, *supra* note 101, at 26. A university headscarf ban in Uzbekistan, which, like Turkey, is a predominantly Muslim nation, was struck down by the U.N. Human Rights Committee (the “Committee”). See U.N. Human Rights Comm., *Communication No. 931/2000: Uzbekistan*, U.N. Doc. CCPR/C/82/D/931/2000, para. 3 (Jan. 18, 2005) (*submitted by Raihon Hudoyberganova*) [hereinafter *Hudoyberganova*]. Unlike the ECHR in *Sahin*, the Committee held that Uzbekistan had violated the rights of Raihon Hudoyberganova under article 18(2) of the International Covenant on Civil and Political Rights (“ICCPR”), which is virtually identical to article 9 of the European Convention. Hudoyberganova was a university student at the Tashkent State Institute when she was denied access to courses and other university privileges after refusing to remove her hijab. The Committee deemed that this action was a violation of the ICCPR right to have or adopt a religion and that Uzbekistan had not made a showing that this policy was necessary. See *id.* para. 6.2.

¹³² See *infra* text accompanying notes 147–153.

¹³³ See *Sahin*, App. No. 44774/98, at para. 108.

¹³⁴ *Id.* para. 109.

neighbor Iran, will impose Islamic values on all citizens.¹³⁵ Perhaps this is a valid fear, but a spokeswoman for the Women for Women's Human Rights organization thinks that the ban is counterproductive, as it will only strengthen the position of hardcore Islamic politicians.¹³⁶ This has proven true as Recep Tayyip Erdogan, who was elected Prime Minister in 2003, is known for his religious observance and promise to end the hijab ban. His party was re-elected by a large margin in July 2008 and did, in fact, attempt to overturn the ban, at least in universities—a decision that put him into political hot water with the courts.¹³⁷

Most times, hijab is not really a threat to public order until someone steps in to *stop* people from wearing it¹³⁸—one need only look to the riots that occurred in France or the controversy following the *foulard* affair.¹³⁹ The Human Rights Watch criticized Turkey for using government power to “force the educational system to reflect the values of state power holders and serve their interests” in contravention of Article 26(1) of the Universal Declaration of Human Rights and Article 13 of the International Covenant on Economic, Social, and Cultural Rights.¹⁴⁰ When it comes to public order, it seems that the ban itself is causing most of the disturbances.¹⁴¹ The Human Rights Watch reports that some officials have stopped women in hijab

¹³⁵ See Lindholm, *supra* note 78, at 16.

¹³⁶ See Gunn, *Fearful Symbols*, *supra* note 101, at 26.

¹³⁷ See *supra* notes 110–113 and accompanying text.

¹³⁸ See *Memorandum*, *supra* note 102, at 24 (“Headscarves do not pose a threat to public safety, health, order, or morals, and they do not impinge on the rights of others . . . [They] are not inherently dangerous or disruptive of order, and do not undermine educational functions.”). The report notes that many Turkish teachers have been suspended or fired for wearing hijab. See *id.* at 28.

¹³⁹ See *supra* text accompanying notes 60–64.

¹⁴⁰ See *Memorandum*, *supra* note 102, at 7–8.

¹⁴¹ Turkey's human rights abuses against education include:

a ban on campuses of any independent organizations that are considered political; refusal of permission to hold a seminar on human rights; state-supported harassment of independent libraries that were established to provide access to materials to which there is no access in state institutions; charges of having published a play that was considered blasphemous; [and] charges against and conviction of the head of a political science department, who was also a contributor to a student magazine, for having defamed the religion of the state.

Id. at 9 (quoting U.N. Econ. & Soc. Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, 37, U.N. Doc. E/CN.4/2000/63 (Jan. 18, 2000) (prepared by Abid Hussain)).

from enrolling in driving classes, that vocal support of a woman's right to wear hijab is grounds for persecution, that academics who have tried to prevent their schools from banning hijab in the dress code have been fired, and that lawyers and human rights campaigners attempting to help women fight for the right to wear hijab have been mistreated by police and prosecuted.¹⁴² Female students who wear headscarves have not only been prevented from entering classrooms and taking exams, but also report being detained, prosecuted, and humiliated.¹⁴³ Having to take the headscarf off in front of men who are not related to them is a major violation of their beliefs.¹⁴⁴ It is Turkey's actions that have caused more public disorder with regard to the ban than the "pressure" on women to which the Court alludes.¹⁴⁵ More than ninety-seven percent of covered Turkish women surveyed in 2008 said that they wore the headscarf to comply with religious beliefs, with less than one percent stating that they wore it to adhere to political views or because their husbands, fiancés, or family members asked them to do so.¹⁴⁶

The irony is that the government pressure on women not to wear the headscarf if they ever hope to be a doctor, lawyer, or other professional, and the harm caused by this pressure, has been concrete. A 2008 study by AK-DER revealed that Turkey ranked 105th out of 115 countries surveyed for women's rights. This placed Turkey behind all EU states and even some Islamic countries in terms of economic opportunity, education, health, and political power.¹⁴⁷

Women in Turkey know that they may not be able to complete their degrees if they choose to wear hijab and that even if they do, their employment options will be severely limited. Women in headscarves have not been permitted to take the Turkish civil service examination since 2000, and there have even been reports of government workers being punished for wearing a headscarf after hours.¹⁴⁸ AK-DER estimates that 15,000 female civil servants were dismissed and or forced to

¹⁴² See AK-DER, Turkey's Gender Equality Ranking, *supra* note 90, pt. V.3.

¹⁴³ See *id.* pt. I.

¹⁴⁴ See *supra* text accompanying notes 15–17.

¹⁴⁵ See *Sahin v. Turkey*, App. No 44777/98 Eur. Ct. H.R. 299, para. 99 (June 29, 2005) (Chamber Judgement).

¹⁴⁶ See AK-DER, Turkey's Gender Equality Ranking, *supra* note 90, pt. V.3.

¹⁴⁷ See *id.* pt. I.

¹⁴⁸ See *id.* pt. II.2(b).

resign for wearing headscarves between 1998 and 2002.¹⁴⁹ The private sector has also been impacted by the headscarf ban. Female lawyers may not wear headscarves in court, forcing them to send proxies in their stead.¹⁵⁰ The Istanbul Bar Association does not allow headscarves,¹⁵¹ and the Ankara Bar Association actually disciplined seventeen female attorneys who wore headscarves while voting in Bar Association elections.¹⁵² These attitudes deprive women of the ability to practice their craft to the fullest extent and enjoy the same opportunities for networking and professional advancement as men. Furthermore, many private firms and organizations hesitate to hire women in hijab due to fears of being seen as fundamentalist and losing business.¹⁵³

That the university headscarf ban was undone and then reinstated in a matter of months in 2008 further underscores that Turkey is a volatile area for religiously observant women pursuing their livelihoods. Since men own ninety-two percent of property in Turkey and account for eighty-four percent of the gross national product,¹⁵⁴ women in headscarves are forced to rely on their husbands or fathers for social security and healthcare benefits.¹⁵⁵ These conditions reveal a far more serious and imminent harm to Turkish women than the ECHR's vague speculation that "pressure" to wear the hijab could someday lead to implementation of Sharia law or some other unnamed threat to the public order. As the dissent of Belgian Judge Françoise Tulkens points out, there is no harm proven in the *Sahin* majority opinion, which relies on "mere worries or fears."¹⁵⁶ The majority focuses on the possible pressures involved in wearing hijab while minimizing the pressure the government puts on religious women who simply wish to follow what they believe is a

¹⁴⁹ See *id.*

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

¹⁵² Jenny White, *Guilty Although Proven Innocent*, KAMIL PASHA, Dec. 13, 2008, <http://www.kamilpasha.com/2008/12/13/guilty-although-proven-innocent/>.

¹⁵³ See AK-DER, Turkey's Gender Equality Ranking, *supra* note 90, pt. II.2(b).

¹⁵⁴ See *id.* pt. II.5(a).

¹⁵⁵ See *id.* pt. II.6(b).

¹⁵⁶ *Sahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, 222 para. 5 (Tulkens, J., dissenting) ("Only indisputable facts and reasons whose legitimacy is beyond doubt . . . are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention.").

prescribed modesty code. If any signatory to the European Convention had a law stating that women could not attend school unless they wore the headscarf, one would expect the ECHR to promptly shoot it down—just as it should have shot down Turkey's analogous ban on the scarf. If a woman can meet university admissions criteria, pass a civil service exam, or be elected to political office, she should be trusted to interpret scripture and make a choice as to her cultural values about covering her head.

When a woman has strong beliefs that her religion requires her to wear hijab, her choices are limited: she can continue her studies sans headscarf in violation of her conscience, she can discontinue her education, or she can go somewhere that allows her to follow both her religion and her aspirations. Women like Sahin often wind up leaving the country to complete their studies. This may be a proper solution for women with the money and resources to do so, but it is not possible for many poorer rural women who, arguably, could benefit from education the most. Ultimately, many Turkish women who are religious and want to wear the headscarf may feel forced to complete their studies in a foreign country. These women may never return because the ban will interfere with their chances of employment, even after they obtain a degree. In this way, Turkey may have deprived itself of a whole generation of professional women and role models. This is a far greater threat to gender equality than the hijab. Educated, professional women who choose to wear hijab show that the hijab does not have to symbolize oppression.¹⁵⁷ By forcing women to choose between education and hijab, a government ensures that the women in hijab will be less able to have careers, thus perpetuating the stereotype that those who wear hijab are the uneducated country-dwellers while the intellectual elite go uncovered. This reinforces the teachings of Ataturk.

¹⁵⁷ See Sabrina Tavernise, *In Turkey, a Step To Allow Head Scarves*, N.Y. TIMES, Jan. 28, 2008, at A3 (noting one woman's belief that she is proof that Ataturk's theory has failed because she is an enlightened woman, engaging in graduate level sociology work, who also wears a head scarf).

2. Secularism

The ECHR first heralded secularism as valuable to democratic society in the 2001 case of *Refah Partisi v. Turkey*,¹⁵⁸ calling it “conducive to religious harmony and tolerance.”¹⁵⁹ The court in *Sahin* noted that in Turkey, “the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith” and thus, reasoned that “[i]mposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since . . . this religious symbol has taken on political significance in Turkey in recent years.”¹⁶⁰ The court heeded Turkey’s concerns about extremist political movements that may “seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts” and respected Turkey’s attempt to take a stance against such movements, given the nation’s past experiences.¹⁶¹

For some, the justification behind the headscarf ban is that secularism promotes public order by allowing students to study free of the political ramifications that the scarf symbolizes.¹⁶² Particularly, the sight of hijab evokes images of political Islam taking over Turkey and suppressing human rights, especially women’s human rights.¹⁶³ In effect, this view represents fears that Turkey will become a country like Afghanistan under the Taliban. People who think this way have trouble seeing headscarves as simply manifestations of individual religious freedom by women. The dissent in *Sahin* found these views meritless—there was no evidence that Leyla Sahin was in any way connected to fundamentalism or that her wearing a headscarf caused any actual incidences of disruption to public

¹⁵⁸ App. No 41340/98 (Eur. Ct. H.R. 2001), available at <http://www.echr.coe.int/echr/> (follow “Case-Law” hyperlink; then follow “HUDOC database” hyperlink; then select “HUDOC Collection” check-block at upper-left corner; then enter “41340/98” in the “Application Number” field; then select “Search” option).

¹⁵⁹ *Id.* para. 51.

¹⁶⁰ *Sahin v. Turkey*, App. No. 447774/98, Eur. Ct. H.R. para. 108 (June 29, 2004) (Chamber Judgment).

¹⁶¹ *Id.* para. 109. The same logic explains why, for example, Germany can take a tougher stance against the expression of Nazi beliefs, given its history with the Holocaust.

¹⁶² *Id.* para. 36; see also Gunn, *supra* note 1, at 455.

¹⁶³ See Gunn, *supra* note 1, at 456–57.

order.¹⁶⁴ Although it is possible that certain types of hijab could cause disruption in the classroom,¹⁶⁵ Turkey did not produce any evidence on that point. Rather, the *Sahin* majority borrowed language from *Dahlab v. Switzerland* about hijab being a “powerful external symbol” while ignoring how gender equality may call for respecting the rights of women.¹⁶⁶ The court, in comparing the law of Turkey to hijab laws in several other countries, never mentioned that Turkey’s law was the only one to ban university students of legal age from wearing hijab, cutting into the “margin of appreciation” argument.¹⁶⁷ Indeed, the court glossed over deciding whether Turkey’s ban on the hijab, even in universities, was constitutional under Turkey’s own legal scheme and simply assumed it to be part of a “democratic” decision-making process that was necessary.¹⁶⁸ Had they looked at Turkey’s own decisions, the court would have found some troubling examples—in several cases, judges who found for the plaintiffs in hijab cases were immediately transferred to courts much further away, which hardly sounds “democratic.”¹⁶⁹ Even students who have won in court have found that the decision did

¹⁶⁴ See *Sahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, 224–25 para. 10 (Tulkens, J., dissenting) (“Merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and ‘extremists’ who seek to impose the headscarf as they do other religious symbols.”).

¹⁶⁵ Human Rights Committee Member Ruth Wedgwood chose to write separate from the majority in the *Hudoyberganova* case due to her belief that the headscarf would legitimately interfere with a woman’s university studies in some instances. In that case, there had been no facts indicating exactly what type of headscarf Hudoyberganova wore. Wedgwood noted that hijab covering her whole face would be problematic if a professor wished to establish eye contact with her or determine whether she was focused on the lecture. See *Hudoyberganova*, *supra* note 131, at paras. 2–4 (individual opinion of Ruth Wedgwood). Wedgwood gives a good example of an appropriate, narrowly tailored measure of whether the human right to wear the headscarf may be infringed in the school context.

¹⁶⁶ *Sahin v. Turkey*, App. No 44777/98, Eur. Ct. H.R. para. 98 (June 29, 2004) (Chamber Judgment) (internal quotation marks omitted); see also Skach, *supra* note 69, at 192.

¹⁶⁷ See *supra* text accompanying note 35.

¹⁶⁸ See Gunn, *Fearful Symbols*, *supra* note 101, at 5.

¹⁶⁹ See Memorandum, *supra* note 102, at 29 (discussing examples of punitive transfers for judges who found the headscarf bans to violate the “constitutional right to education”).

not have any practical effect, as the school still did not allow them to complete their degrees.¹⁷⁰

Critics say that *Sahin* demonstrates “how failing to analyze the issues objectively and openly can result in the suppression of human rights by an institution that was created to protect them.”¹⁷¹ According to a 2004 survey, seventy-one percent of Turkish citizens believe hijab should be an option for university students and sixty-four percent think female government officials should be allowed to wear headscarves in office.¹⁷² Nevertheless, with the recent attempt to lift the ban in universities having been overturned by the courts and the subsequent political trouble for the party who supported the change, the prognosis for any advancement is bleak.

IV. HIJAB IN UNITED STATES SCHOOLS

A. *The Problem*

The United States Constitution protects the right to free exercise of religion.¹⁷³ There can be no federal ban on religious dress in this country.¹⁷⁴ Laws that specifically target religious practice are subject to strict scrutiny by courts, which means that the state must show a compelling interest for the law and prove that the law is narrowly tailored to protecting that interest.¹⁷⁵ This is comparable to the ECHR test, in which the government must prove that a limitation of religious freedom is proportional to a legitimate government aim.¹⁷⁶ The ECHR determined that

¹⁷⁰ See *id.* at 29–30 (discussing Fatma Gökçen’s expulsion from her place in the physics department of the Istanbul University science faculty for wearing the headscarf and participating in a protest). The Turkish Administrative Court said this interfered with Gökçen’s constitutional right to public protest, but the school still refused to let her in, rendering her unable to complete her degree and find a job. Like Sahin, she left Turkey—Gökçen continued her studies in the United States. See *id.*

¹⁷¹ Gunn, *Fearful Symbols*, *supra* note 101, at 1.

¹⁷² See Kavakci, *Headscarf Heresy*, *supra* note 21, at 66.

¹⁷³ See U.S. CONST. amend. I.

¹⁷⁴ See Custos, *supra* note 28, at 340 (outlining arguments that a historical commitment to freedom of religion and expression would lead to a judicial rejection of an attempt to pass an American counterpart to the French ban).

¹⁷⁵ See *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

¹⁷⁶ See, e.g., *Sahin v. Turkey*, App. No 44774/98, Eur. Ct. H.R. para. 103 (June 29, 2004) (Chamber Judgment).

Turkey had a compelling interest to ban headscarves in *Sahin*.¹⁷⁷ The U.S. Supreme Court would conclude otherwise because the U.S. does not have the same concerns of Islamic fundamentalism or pressure on girls to wear the headscarf. Although the U.S. recognizes separation of church and state under the Establishment Clause, we do not have the same staunch concept of secularism—*laïcité*, or *laik*—as France and Turkey, diminishing the likelihood of finding a compelling interest on that basis.¹⁷⁸

Even in light of the protections provided by the Constitution, U.S. law is not always as protective of the right of students to wear religious dress as one would think. For example, a generally applicable and neutral law or policy in a school against all hats or caps could pass constitutional muster even though it would impinge on the First Amendment right to exercise one's religious belief by wearing a headscarf or turban.¹⁷⁹ Until the 1990 decision of *Employment Division v. Smith*,¹⁸⁰ all laws conflicting with religious freedom had to undergo a strict scrutiny analysis;¹⁸¹ if the law was not narrowly tailored to achieve a compelling state interest, the state had to grant a religious exemption to believers. *Smith* changed the law by establishing that the government need not prove a compelling interest if the law was deemed neutral. As long as the burden on religious believers is only incidental and religion is not specifically targeted, the law is constitutional, and no religious exemption need be made.¹⁸² This was a huge shift in the landscape of religious jurisprudence in the U.S. since it is difficult for plaintiffs to show that a law specifically targets religion.¹⁸³ Even when they do, they will not win until they demonstrate that the law fails strict scrutiny.

¹⁷⁷ *Id.* para. 84.

¹⁷⁸ See U.S. CONST. amend. I.

¹⁷⁹ See *infra* text accompanying note 190.

¹⁸⁰ 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

¹⁸¹ *Id.* at 885.

¹⁸² See *id.* at 879.

¹⁸³ See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533–34 (1993).

In response to *Smith*, Congress passed the Religious Freedom Restoration Act ("RFRA"),¹⁸⁴ which mandated that potential violations of religious freedom would fall under strict scrutiny.¹⁸⁵ Part of the RFRA, however, was overturned in 1997 because it overstepped Congress's power to enforce the Fourteenth Amendment against states.¹⁸⁶ In *Gonzales v. O Centro Espírita Beneficente União do Vegetal*,¹⁸⁷ the Court held that the federal government must show a compelling state interest in restricting religious freedom, affirming that the RFRA applies when examining a federal law.¹⁸⁸ Thirteen states now have their own versions of the RFRA to provide protection where the federal government does not, and appellate courts in at least another twelve have interpreted their state constitutions under the *Sherbert* compelling interest test instead of the test from *Smith*.¹⁸⁹

For the hijab debate, this means that any attempt by the federal government to ban hijab would be subject to strict scrutiny and the ban would probably be struck down.¹⁹⁰ This is not particularly relevant in the school context because education is generally within the realm of state law. Since the federal RFRA does not apply to states, a state could ban hijab in schools if the ban were part of an otherwise neutral law,¹⁹¹ unless some state-enacted RFRA prevented doing so. Less than half of the states, however, actually have their own RFRA's.¹⁹² After

¹⁸⁴ 42 U.S.C. § 2000bb (2006).

¹⁸⁵ *Id.* § 2000bb(b)(1).

¹⁸⁶ See *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

¹⁸⁷ 546 U.S. 418 (2006).

¹⁸⁸ See *id.* at 424. This case is distinguishable from *Smith*, in which the Court found that Oregon was not constitutionally mandated to grant an exemption from a state anti-drug law to Native Americans who used peyote in a religious ceremony, since the law was generally applicable to all. See *Smith*, 494 U.S. at 890. *Gonzales* dealt with a federal law, the Controlled Substances Act, and there, the Court held that strict scrutiny must be applied in deciding whether to grant an exemption regardless of general applicability—in effect confirming the RFRA's mandate to analyze under the *Sherbert* test. See *Gonzales*, 546 U.S. at 424–25, 439.

¹⁸⁹ See Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOBAL LEGAL STUD. 503, 537 (2006).

¹⁹⁰ See *supra* note 4.

¹⁹¹ The French law, although neutral insofar as it does not single out the garb of one religion, specifically targets religion as opposed to non-religion. Thus, any American counterpart would not pass the *Smith* test and would need to be analyzed under strict scrutiny. See Laycock, *supra* note 189, at 538–39.

¹⁹² See *supra* text accompanying note 189.

the part of the RFRA that applied to states was ruled unconstitutional, the U.S. Department of Education revised its guidelines for schools: "Students generally have no federal right to be exempted from religiously neutral and generally applicable school dress rules based on their religious beliefs or practices."¹⁹³ This leaves it up to individual states and schools to provide as much protection as they like but makes it clear that the burdensome *Smith* rule applies if there is a challenge by a student, unless the student could show some evidence that the policy is not neutral towards religion—for example, by demonstrating that the school allows exceptions from the policy in non-religious contexts but not for religious adherents.¹⁹⁴

Perhaps Justice Scalia, who authored the decision in *Smith*, would agree that it is the responsibility of citizens to bring their disagreements with the law to the states by asking their local governments or school boards for assistance. The original RFRA was a response to *Smith*, and when it was struck down because Congress did not have the Fourteenth Amendment power to pass it, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA")¹⁹⁵ pursuant to its commerce and spending powers. The RLUIPA subsequently restored the strict scrutiny test in some areas of the law. This demonstrates the historic tradition of respect the American government and its people have had for religious freedom, in contrast to *laïcité's* near hostility to religion. Still, *Smith* presents a sort of loophole in American law that deserves to be looked at in a comparative law context. While no law can be passed to explicitly prevent the wearing of hijab, we do not necessarily provide enough federal

¹⁹³ Charles C. Haynes, *Dress Codes vs. Religious Practice: What Kind of Nation Are We?*, FIRSTAMENDMENTCENTER.ORG (Oct. 19, 2003), <http://www.firstamendmentcenter.org/commentary.aspx?id=12080> (quoting U.S. Dep't. of Educ., Religious Expression in Public Schools (May 1998), <http://www.ed.gov/Speeches/08-1995/religion.html>) (internal quotation marks omitted).

¹⁹⁴ See *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (applying strict scrutiny to a New Jersey police department policy requiring all men to shave their beards because it was not neutral and generally applicable, as the department granted medical exemptions to some officers but refused to do the same for Muslim officers who sincerely believed that wearing a beard was a requirement of their religion).

¹⁹⁵ See generally 42 U.S.C. §§ 2000cc to -5 (2006) (protecting religious institutions and prisoners from laws that burden their free exercise rights).

protection when people who wear headscarves are incidentally burdened. Other Western countries, such as Canada¹⁹⁶ and Great Britain,¹⁹⁷ provide explicit protection to students.

In its failure to provide such federal protection, the American system leaves it to the states to do so, or alternatively, to the school districts to come up with a compromise¹⁹⁸ or change their dress codes.¹⁹⁹ In the end, most of these problems are worked out in a rational manner but not without causing significant strife and pain to the young people who are affected. An eleven-year-old Muslim girl was suspended from an Oklahoma public school for wearing hijab under a policy intended to reduce gang-related activity.²⁰⁰ After wearing the hijab without incident for several weeks upon commencement of the school year, Nashala Hearn was asked by school officials on

¹⁹⁶ According to the Quebec Human Rights Committee, "one should presume that hijab-wearers are expressing their religious convictions and the hijab should only be banned when it is demonstrated—and not just presumed—that public order or sexual equality is in danger." Baines, *supra* note 30, at 324 (internal quotation marks omitted).

¹⁹⁷ The leading British case on the subject is *R v. Denbigh High School*, [2006] UKHL 15, [1]–[99] (Eng.), available at <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060322/begum.pdf>. The school uniform at Denbigh allowed female students to wear a certain type of Muslim dress called shalwar kameeze, but thirteen-year-old Shabina Begum insisted on wearing the more modest jilbab. *See id.* at [6], [10]. The prior Court of Appeals decision in this case took *Sahin* into consideration, but distinguished it on the ground that unlike Turkey, England is not a secular state. *See id.* at [60]–[61]. It is ironic that an officially Anglican state would use such reasoning to protect the rights of Muslims to a greater extent than Turkish law does. The Court of Appeals held that the school had a duty to provide Begum with an education, which would not be possible for her had she been unable to wear certain garments. *See id.* at [27].

¹⁹⁸ *See, e.g.*, Haynes, *supra* note 193 (noting that a school reversed a decision to ban a sixth grader from classes because she would not remove her headscarf, pending a review of school policy).

¹⁹⁹ *See, e.g.*, Associated Press, *Tennessee High School OKs Muslim Head Scarf*, FIRSTAMENDMENTCENTER.ORG (Jan. 16, 2005), <http://www.firstamendmentcenter.org/news.aspx?id=14697> (reporting that a public high school will now allow exceptions from a school's ban on head coverings for Muslim girls in hijab, despite the school's concern that, among other things, "other students would feel excluded, [and a] negative image of Muslim [sic] would create safety concerns for" a complaining student).

²⁰⁰ *See* United States' Memorandum of Law in Support of Its Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at 2, 5–6, *Hearn v. Muskogee Pub. Sch. Dist. 020*, C.A. No. CIV 03-598-S (E.D. Okla. May 6, 2004), available at http://www.usdoj.gov/crt/religdisc/musk_memo.pdf; *see also* Reuters, *Muslim Girl Suspended for Head Scarf*, CNN.COM (Oct. 11, 2003), <http://www.cnn.com/2003/EDUCATION/10/11/scarf.reut>.

September 11, 2003, to remove it because “hats, caps, bandannas, plastic caps, and hoods” were prohibited by the dress code.²⁰¹ This is a good example of selective enforcement. That Hearn was called out on the anniversary of the September 11th attacks was hardly coincidental—school officials stated that they thought the hijab would “frighten” other children.²⁰² Upon her refusal to remove the scarf, Hearn was suspended twice: first for three days, then another five.²⁰³ The U.S. Department of Justice filed a complaint on her behalf,²⁰⁴ and the case was eventually settled out of court, with an allowance for Hearn to wear hijab to school.²⁰⁵ The school was justified in suspending her under *Smith* because it was acting under a neutral, generally applicable law. It is notable that Oklahoma actually had passed a state RFRA in 2000,²⁰⁶ restoring strict scrutiny, but even that had not stopped the incident from occurring because the school did not write a religious exemption into their dress code until the *Hearn* settlement. The existence of the state RFRA would have impacted the school’s argument had the case been adjudicated.

There is little appellate case law on the issue of religious dress, as some compromise is usually reached by the parties outside of court. Much of the evidence of this problem remains at the local level. This is a good sign because it proves that hijab discrimination is not as prevalent in the United States as in Europe, and most schools do their best to avoid it or rectify it. When a thirteen-year-old Sudani Muslim immigrant was asked to take off her hijab because of a school’s “no hat” policy, the school sent her a letter of apology for the humiliation she

²⁰¹ See The Rutherford Institute, Religious Freedom under Siege in America: A Special Report from The Rutherford Institute (June 8, 2004), http://www.rutherford.org/articles_db/legal_features.asp?article_id=85.

²⁰² See Stefanie Walterick, *The Prohibition of Muslim Headscarves from French Public Schools and Controversies Surrounding the Hijab in the Western World*, 20 TEMP. INT’L & COMP. L.J. 251, 268 (2006) (internal quotation marks omitted).

²⁰³ See *id.*; Rutherford Institute, *supra* note 203.

²⁰⁴ See Press Release, U. S. Dep’t of Justice, Justice Department Files Complaint Against Oklahoma School District Seeking to Protect Student’s Right to Wear Headscarf to Public School (Mar. 30, 2004), http://www.usdoj.gov/opa/pr/2004/March/04_crt_195.htm.

²⁰⁵ See Associated Press, Muslim Student, *Oklahoma District Settle Hijab Lawsuit*, FIRSTAMENDMENTCENTER.ORG (May 20, 2004), <http://www.firstamendmentcenter.org/news.aspx?id=13379>.

²⁰⁶ See Haynes, *supra* note 193.

suffered from being singled out.²⁰⁷ This is a positive step, and if the courts were to decide cases based on the analysis provided in this Article, the country would continue towards a more understanding, tolerant, and pluralistic paradigm. Accordingly, students who wear the headscarf would no longer be subject to humiliation because of their religious beliefs.

This shift in analysis is necessary because the lack of post-*Smith* protection at the state level still allows for some grossly unjust punishments to be taken against students. A junior at a public high school in Plattsburgh, N.Y., was sent to in-school suspension—a “solitary confinement” during which he studied in the library without any instruction from teachers or participation in extracurricular activities—for seventy-three days for wearing a red headband that was a rite of passage within his Native American religious beliefs.²⁰⁸ Lawyers from a civil rights group pressured the school into letting him back into class with the headband.²⁰⁹ While the problem was eventually resolved, this is a highly disproportionate punishment just for a student’s expression of his religious beliefs. Although they are not adults, students are not required to leave their constitutional rights “at the schoolhouse gate.”²¹⁰ In a case that would not even pass muster under the French law, a Jewish student in a Mississippi high school was asked to remove his Star of David necklace because the school considered it a “gang symbol”—the school capitulated and allowed a religious exemption once the American Civil Liberties Union intervened on his behalf.²¹¹

A new legal standard would preclude these events from initially occurring. School actions like the above could chill certain students from wearing headscarves if they are on the fringe—for example, there are girls who would like to wear hijab as an expression of their religious and cultural heritage but do not feel that they are required by their religion.²¹² This is not

²⁰⁷ See Associated Press, *Calif. School Apologizes for Ordering Muslim Girl To Remove Scarf*, FIRSTAMENDMENTCENTER.ORG (June 27, 2007), <http://www.firstamendmentcenter.org/news.aspx?id=18726>.

²⁰⁸ See Haynes, *supra* note 193.

²⁰⁹ See *id.*

²¹⁰ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

²¹¹ See Walterick, *supra* note 202, at 268–69.

²¹² See *Isaacs v. Bd. of Educ.*, 40 F. Supp. 2d 335, 335–36 (D. Md. 1999) (granting summary judgment to a school that used a “no hats” policy to force a student to

acceptable. In a time when Muslim students are subject to harassment, an Oklahoma school should not be able to call out a student on the anniversary of September 11th and ask her to stop wearing hijab—this sends the wrong message to students who are biased against Muslims. The U.S. situation does not even approach the amount of human rights abuses occurring in France and Turkey, but we should be held to a higher standard given our pluralistic history. Since September 11, 2001, Muslims have been targeted for discrimination and acts of violence in the U.S. A study by the Council on American-Islamic Relations reports that most of the time, some identifiable Islamic symbol, such as the headscarf, is what triggers acts of discrimination.²¹³ For example, in a Florida case, a Muslim middle-school student was called “Osama” and beaten with a belt because classmates identified her as Muslim due to her headscarf.²¹⁴ Allowing schools to tell students that they must take off the scarf to protect other students sends a troubling message to bullies.

B. *The Solution*

Employment Division v. Smith covers the constitutionality of religious exemptions. By classifying student religious dress issues under generally applicable policies as “hybrid” claims, a case can get out from under *Smith* and back to the strict scrutiny test.²¹⁵ In *Smith*, the court harmonized its holding with earlier cases such as *Wisconsin v. Yoder*,²¹⁶ in which the Court held that Amish parents could be granted an exemption from compulsory education laws that would require them to send their children to school until age sixteen, in contravention of their religious beliefs,²¹⁷ by explaining that they were hybrid claims that invoked something more than just religious freedom.²¹⁸ *Yoder*, explained the majority, dealt with not only a First Amendment

remove a multicolored African headwrap that she wore to honor her cultural heritage).

²¹³ See Baker, *supra* note 30, at 351 (suggesting that government policies such as the Patriot Act help to fuel fear and hatred of Muslims).

²¹⁴ See Walterick, *supra* note 202, at 269.

²¹⁵ See *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990), *superseded by statute*, Religious Freedom Restoration Act, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

²¹⁶ 406 U.S. 205 (1972).

²¹⁷ *Id.* at 234.

²¹⁸ See *Smith*, 494 U.S. at 881.

religious claim, but also a claim for parental authority to direct a child's education,²¹⁹ which was deemed a constitutional right in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*.²²⁰

The claim of a student wishing to wear a religious symbol to school can be considered a hybrid claim, invoking both the First Amendment right to free exercise and the First Amendment right to freedom of speech.²²¹ For this reason, if a case regarding hijab or another religious symbol should ever reach the Supreme Court, the Court should require the school to grant the student a religious exemption. Alone, either claim would fail—students do not have an unlimited right to freedom of expression in schools,²²² and they do not have the right to a religious exemption from a generally applicable policy.²²³ When taken together, however, the claim should prevail, just as in *Yoder*. The parental right to make decisions about their children's education does not extend to granting an exemption from sending their children to school for secular reasons—laws compelling attendance until age sixteen continue to exist. When the religious claim is added, however, it strengthens the argument enough that the exemption is granted. So too should the right to free expression bolster the right to religious exercise when it comes to the wearing of a religious symbol.²²⁴ In France and Turkey, hijab is banned precisely *because* of its political symbolism, so in those countries, this hybrid argument would fail. In the U.S., however, the right to freedom of political speech, even in the student context, was explicitly upheld in *Tinker v. Des Moines Independent Community School District*,²²⁵ in which a student wore a black armband in protest of the Vietnam War.²²⁶ Another potential hybrid argument is one for parental rights, like in *Yoder*. While part of France's and Turkey's rationales for their bans is to

²¹⁹ See *id.*

²²⁰ 268 U.S. 510, 534–35 (1925).

²²¹ See U.S. CONST. amend. I.

²²² See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

²²³ See *supra* text accompanying note 193.

²²⁴ See *Smith*, 494 U.S. at 881–82 (noting the Court's history in deciding hybrid free speech and free exercise claims).

²²⁵ 393 U.S. 503.

²²⁶ *Id.* at 513–14.

prevent parents from forcing students to wear hijab, U.S. constitutional law supports the right of parents to influence their children's religious beliefs.²²⁷

Once it is established that a hijab claim is a hybrid claim, the next step is to apply strict scrutiny. While the hijab ban in Turkey passed a *Sherbert*-style test in the ECHR in *Sahin*, even a generally applicable and neutral ban on coverings should fail a similar test in the U.S. if it burdens religious believers. The first question is whether there is a compelling interest in asking students to remove hijab. *Sahin* held that there was, but in Turkey, as well as in France, the hijab itself is considered a threat to public order and gender equality. These concerns simply do not exist in America; there is no threat of fundamentalist Islam taking over, nor is there a risk that significant numbers of women will feel pressure to wear the hijab once they see others do so. Our principle of secularism is not as extreme as *laïcité*, so that argument would likewise fail the compelling interest prong.²²⁸ This explains why a ban on hijab or religious symbols in general would fail strict scrutiny, but when it comes to a neutral law requiring all head coverings to be removed, something like curbing gang activity in the school context would be considered a compelling interest.²²⁹

The question then becomes whether the school's policy is narrowly tailored to that interest—enough to curb gang activity in a way that allows for the most freedom of religious expression. If it is speculative for Turkey and France to assume that allowing peaceful women like Leyla Sahin to wear headscarves will lead to a wave of fundamentalist Islam, it would be equally speculative for U.S. schools to argue that head coverings should be banned

²²⁷ See Baker, *supra* note 30, at 360–62 (analogizing the headscarf situation to *Yoder*, noting that, as the Amish argued regarding school attendance, “Muslim parents may also claim that forcing their daughter to remove her headscarf causes her to forego a practice that is essential to her development in the faith and integration into her community”); see also *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (holding that statute requiring school attendance may not “unreasonably interfere[] with the liberty of parents and guardians to direct the upbringing and education of children under their control” and that states must thus allow parents to opt for parochial school for their children).

²²⁸ See *supra* text accompanying note 178.

²²⁹ See, e.g., *Johnson v. California*, 543 U.S. 499, 502–03, 507, 512–13 (2005) (discussing curbing gang activity in prisons as a compelling interest); *id.* at 547–48 (Thomas, J., dissenting).

due to gangs in cases where, like *Sahin*, the students wearing them have not had any violent tendencies or problems with the school.²³⁰ Gang symbols are easily distinguishable from religious garb, and students who wear such garb should not be burdened unless a school can show actual evidence that, for example, a local gang is using a Star of David as its symbol. The solution proposed in the *Hearn* settlement order is a good one—if a student wants to wear a head covering with religious meaning, his or her parents can submit an application to the school board, and the student can be granted a temporary religious exemption pending its review.²³¹ This is an elegant solution that provides the appropriate, narrowly tailored response to the threat of gang activity. Another constitutional solution would be to analyze hijab cases under the *Tinker* test, which governs freedom of expression generally in the schools. This would require a showing of “facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities”²³² before asking someone to remove the hijab—something that the *Sahin* court failed to consider.

CONCLUSION

It is counterintuitive to defend headscarf bans on the basis of gender equality. These bans demean women by suggesting that females are highly susceptible to the influence of fundamentalists or are incapable of thinking for themselves, and furthermore, that such women outnumber those who make a carefully considered personal choice to wear the headscarf. Because of these bans, women will be faced with an ultimatum to choose between wearing headscarves and completing their

²³⁰ For example, in a Canadian case, the court took into account the fact that a student had never had disciplinary problems in ruling that the government violated his rights by not allowing him to wear his Sikh ritual knife, or kirpan, to school. See *Multani v. Comm'n Scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, paras. 41, 57 (Can.). There, of course, the knife is a greater danger than simply the wearing of a headscarf alone.

²³¹ See Consent Order at 3, *Hearn v. Muskogee Pub. Sch. Dist.*, C.A. No. CIV 03-598-S (E.D. Okla. May 2004), available at www.usdoj.gov/crt/religdischearn_consent_decree_final.pdf. Per the order, the school board agrees to approve all such applications unless it finds that the religious beliefs are not “sincerely held” or that the exemption would “cause a material danger to safety.” See *id.*

²³² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

educations or even remaining in their respective countries. Moreover, these bans can act as a gateway to other human rights abuses—including lack of access to education, suspensions from jobs, and other forms of detainment—inflicted on women, who are so often the most vulnerable to human rights attacks in the first place. Hijab cases as extreme as those seen in Turkey and France do not generally arise in the U.S., but it is frustrating that the freedom to wear such an important religious article is even an issue here; no student should ever be asked to remove her hijab. Training for school officials should educate them on the meaning of items like the headscarf, so that they understand how humiliating it is for a young girl to have to take it off or how upsetting it would be to have to choose between that and leaving school. This education, along with the legal paradigm provided in this Article for U.S. courts, would curb the use of neutral laws against bandanas or hats against these students. School is where students should learn about tolerance and pluralism, which are great aspects of the diversity of the United States.

